STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals
(Hon. Markey, P.J., Cavanagh, and R.P. Griffin, JJ)

JULIE NEAL,	Supreme Court No.	122498
Plaintiff-Appellee,	Court of Appeals No:	230494
vs.	Lower Court No: (Eaton County)	99-968-NO
TERRY WILKES,		
Defendant-Appellant.		

DEFENDANT/APPELLANT'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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JURISDICTIONAL STATEMENT

1. MCR 7.301(A) provides this Honorable Court with the discretion to review the decision of the Court of Appeals.

2. Defendant filed an Application for Leave to Appeal from the unpublished per curiam Opinion of the Court of Appeals, released September 17, 2002, reversing the September 1, 2000 order of the Eaton County Circuit Court granting Defendant's Motion for Summary Disposition.

3. This Honorable Court granted leave to appeal in an Order of Court dated October 24, 2003.

STATEMENT OF QUESTIONS INVOLVED

I. **Did the Court of Appeals Err in Failing to Apply the Recreational Land Use Act to Bar Plaintiff's Claims Against the Defendant?**

Defendant answers "yes".
Plaintiff answers "no".
The Court of Appeals answered "no".

II. **Should this Court Apply the Plain Meaning Rule to the Recreational Land Use Act and Reverse the Wymer and Ballard Decisions?**

Defendant answers "yes".
Plaintiff would answer "no".
The Court of Appeals did not address this issue.

STATEMENT OF FACTS

A. Factual History

This is a premises liability claim arising out of a July 9, 1998 accident which occurred on Defendant's property while Plaintiff was riding as a passenger on the back of a four-wheel ATV. Defendant's home is located on an 11.04 acre parcel of land in Dimondale, Michigan. (Certified Boundary Survey, Appendix p. 10a). The house is set in the northeast corner of the plot, approximately 107 feet south of the north boundary and 110 feet east of the west boundary. (Appendix p. 10a). Behind the house is a large grassy area which extends to the south and east several hundred yards and a larger wooded area. (Pictures of property - Appendix pp. 6a-8a). Both the large grassy area and the wooded areas are used for recreational activities such as riding ATVs. The accident occurred on the area of land just outside of where the woods meet the grassy area.

On the day of the accident Plaintiff, Elizabeth Sanchez, and Kim Norman, the Defendant's brother, were visiting Defendant at his home. Eventually the group decided to ride the ATVs on the trails in the wooded area of the property. Mr. Norman drove while Ms. Neal was a passenger on one of the ATVs. Ms. Neal testified that Mr. Norman took her on the trails in the back woods. (Deposition of Julie Neal, Appendix p. 45a). During plaintiff's first ride, Mr. Norman was driving in an area of the property where he should not have been driving because the terrain was too dangerous. (Deposition of Terry Wilkes, Appendix p. 27a). Defendant told Mr. Norman and Ms. Neal to take the ATV back to the pole barn and put the ATV away. (Deposition of Terry Wilkes, Appendix p. 27a). Defendant specifically told Mr. Norman that he was not to drive the ATV. (Deposition of Terry Wilkes, Appendix p. 27a).

Despite Mr. Wilkes' directive, Plaintiff later asked Mr. Norman to take her for another ride. (Deposition of Julie Neal, Appendix p. 44a). Mr. Norman took Plaintiff for a last ride on the trail. On the way back to the house, just after exiting the wooded trail, Mr. Norman drove over some ripples on Mr. Wilkes' land. (Deposition of Julie Neal, Appendix p. 45a). Plaintiff alleges that when Mr. Norman drove over these ripples, she was bounced on the ATV, which caused her back injury. Although Ms. Neal was unable to recall whether she had been over that particular portion of the Defendant's property on one of her previous rides, Mr. Norman unequivocally testified that he traveled the same path with the Plaintiff before her injury. (Deposition of Kim Norman, Appendix p 57a). The land where the injury occurred is nothing more than wavy ground with ripples no more than six inches high. (Deposition of Terry Wilkes, Appendix p. 24a). See also, the picture of the placed where the injury allegedly occurred attached as Appendix pp. 6a-8a.

Plaintiff filed suit against Defendant based on four theories:

1. Defendant was negligent in failing to maintain a safe premises and in failing to warn Plaintiff of the unsafe condition of the land. (Complaint ¶ 14);
2. Defendant negligently entrusted the ATV to an individual who was incompetent; (Complaint ¶ 15);
3. Defendant, as the owner of the ATV, is vicariously liable for Mr. Norman's negligence, which consisted of:
   a. operating an ATV with a passenger;
   b. failing to make proper observations of the condition of the property; and
   c. operating an ATV at a speed too fast for the conditions then existing. (Complaint ¶ 16).
4. Defendant created or maintained a dangerous condition on the premises which constituted a nuisance. (Complaint ¶ 23).

(Appendix pp. 12a-17a).

In light of the fact that Plaintiff's injury occurred on a large tract of land in its relatively

natural state, Defendant is entitled to summary disposition under the Recreational Land Use Act (RUA), MCL 324.73301.

B. Procedural History

On August 5, 1999, Plaintiff filed suit against the Defendant alleging the claims set forth above. On September 24, 1999, the attorneys from Roberts Betz and Bloss, P.C. filed an Appearance, Answer to Plaintiff's Complaint, and Affirmative Defenses on behalf of the Defendant. The attorneys from Roberts Betz and Bloss did not include immunity under the Recreational Land Use Act as an affirmative defense.

On October 4, 1999, the trial court issued a scheduling order which provided that all amendments to the pleadings must be filed by January 1, 2000 and that discovery was to be completed by May 1, 2000. However, the Court stated that this order may be amended upon a showing of good cause after a motion or conference call. On March 6, 2000, Defendant changed attorneys, and Worsfold Macfarlane McDonald, P.L.L.C., filed a substitution of attorneys. On April 24, 2000, Defendant filed a Motion for Leave to Amend the Affirmative Defenses with Brief in Support. In this motion, Defendant sought to add immunity under the RUA as an affirmative defense. In conjunction with this motion, Defendant also filed a Motion for Summary Disposition, alleging that Plaintiff's claims were barred as a matter of law under the Recreational Land Use Act, that there was no liability under the Owners' Liability Statute, and that there was no nuisance as a matter of law. Both motions were scheduled to be heard by the Court on May 19, 2000.

On May 19, 2000, the Court held oral arguments on Defendant's Motion for Leave to Amend the Affirmative Defenses. Defendant argued that leave to amend affirmative defenses

should be freely given, and that Defendant should be allowed to add immunity through the Recreational Land Use Act as an affirmative defense. (Transcript of May 19, 2000 hearing, Appendix pp. 60a-73a). Over Plaintiff's objection, Judge Osterhaven granted Defendant's Motion for Leave to Amend his Affirmative Defenses and allowed Plaintiff 60 days of additional discovery so that Plaintiff fully research this affirmative defense. (Order of Trial Court, Appendix p. 74a). Defendant's Motion for Summary Disposition was not heard at this time.

After the 60 days of discovery, oral arguments on Defendant's Motion for Summary Disposition was heard by Judge Osterhaven on August 18, 2000. The Court determined that there were no genuine issues of material fact and that Defendant was entitled to summary disposition. (Transcript of August 18, 2000 hearing, Appendix pp. 80a-101a). Specifically, the Court determined that Plaintiff's injury occurred on land in its relatively natural state, and that Defendant was entitled to protection under the Recreational Land Use Act. Orally, Plaintiff sought leave to file an amendment to her pleadings, however, the Court ruled that any gross negligence amendment would be futile in light of the facts which had been developed. Plaintiff's case was dismissed in an order dated September 1, 2000. (Order Granting Motion for Summary Disposition, Appendix p. 102a). On September 14, 2000, Plaintiff, through new counsel, filed a Motion for Reconsideration. On October 3, 2000, the Court entered an Order denying Plaintiff's Motion for Reconsideration.

Plaintiff filed a Claim of Appeal on October 23, 2000. Both parties submitted briefs and oral arguments were held before the Court on September 4, 2002. On September 17, 2002, the Court of Appeals issue an unpublished, per curiam decision reversing the order granting summary disposition. (Appendix p. 104a). In so doing, the Court of Appeals relied on the ruling

in Wymer v Holmes, 429 Mich 66; 412 NW2d 213 (1987) for the proposition that the recreational land use act was only to be applied "to large tracts of undeveloped land suitable for outdoor recreational uses." In reversing the lower court's ruling, the Court of Appeals cited to the affidavit of Arthur St. Clair, the township supervisor for the village of Dimondale, for the proposition that the Defendant's property is zoned for residential use, is both subdivided and improved, and is either urban or suburban land. (Appendix p. 105a).

Defendant-Appellant filed an Application for Leave to Appeal. After a hearing which was held on October 15, 2003, this Court granted Defendant-Appellant's Application for Leave to Appeal in an Order dated October 24, 2003. (Appendix p. 106a). In granting the application, this Court requested that the following issues be addressed:

1. Whether the RUA applies to the plaintiff's injuries which occurred on Defendant's land;
2. Whether MCL 324.73301(1) applies to residential lands;
3. Whether the manner in which the Legislature phrased MCL 324.73301(2) has any significance;
4. Whether this Court should reverse in its decisions in Wymer v Holmes, 429 Mich 66; 412 NW2d 213 (1987) and Ballard v Ypsilanti Township, 457 Mich 564, 577 (1998); and
5. Whether the resolution of this case would affect the general body of principles governing outdoor premises liability law.

(Appendix p. 106a).

Defendant asks that this Court reverse the Court of Appeals' decision and reinstate the trial court's grant of summary disposition. Defendant further requests that this Court reverse the Wymer, supra, decision.

ARGUMENTS

I. The Court of Appeals Erred in Ruling That the Recreational Land Use Act Did Not Apply in the Case.

A. Standard of Review

As previously stated, the Court of Appeals reversed the trial court's order granting Defendant's Motion for Summary Disposition. The issue in this case is whether the Court of Appeals erred in determining that the RUA did not apply because Defendant's land was zoned for residential use. The Supreme Court reviews decisions regarding motions for summary disposition de novo. Spiek v Dep't of Transportation, 456 Mich 331; 572 NW2d 201 (1998).

A motion for summary disposition will be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. CNA Insurance Co v Cooley, 164 Mich App 1; 416 NW2d 355 (1987); MCR 2.116(C)(10). The party opposing the motion for summary disposition has the burden of showing that a genuine issue of disputed fact exists. Ewers v Stroh Brewery Co, 178 Mich App 371, 374; 443 NW2d 504 (1989). The opponent to the motion, must, by documentary evidence, set forth specific facts showing there is a genuine issue for trial. Id. MCR 2.116(G)(4). The existence of a disputed fact must be established by admissible evidence. Pauley v Hall, 124 Mich App 255, 262; 335 NW2d 197 (1983), lv den 418 Mich 870 (1983).

B. The Recreational Land Use Act Applies to this Case to Bar Plaintiff's Claims Against Defendant.

In granting the Application for Leave to Appeal, this Court asked the parties to brief the issue of whether the RUA bars Plaintiff's claims for damages. MCL 324.73301(1) states:

> Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

Id.

In Wymer v Holmes, 429 Mich 66; 412 NW2d 213 (1987), the Michigan Supreme Court analyzed the legislative history behind the RUA and determined:

> the Legislature intended the act to apply specifically to certain enumerated outdoor activities (fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling) which, ordinarily, can be accommodated only on tracts of land which are difficult to defend from trespassers and to make safe for invited persons engaged in recreational activities. The commonality among all these enumerated uses is that they generally require large tracts of open, vacant land in a relatively natural state. This fact and the legislative history of the RUA make clear to us that the statute was intended to apply to large tracts of undeveloped land suitable for outdoor recreational uses. Urban, suburban, and subdivided lands were not intended to be covered by the RUA. The intention of the Legislature to limit owner liability derives from the impracticability of keeping certain tracts of lands safe for public use. The same need to limit owner liability does not arise in the case of recreational facilities which, in contrast, are relatively easy to supervise and monitor for safety hazards.

Id. at 79.

In Wilson v Thomas L. McNamara, 173 Mich App 372; 433 NW2d 851 (1988), the Court stated:

> the act was designed to limit owner liability on large tracts of undeveloped land which are suitable for outdoor recreational use and are difficult to defend from trespassers and to make safe for invited persons engaged in recreational activities.
>
> *****
>
> The focus is on the use of the land and whether it remains in a relatively natural state or has been developed and changed in a manner incompatible with the intention of the act. . . The central issue in this case is the character of the land.

Id. at 377.

In Wilson, supra, the plaintiff's son drowned in a man-made pond which was located on a large tract of undeveloped land. The Court ruled that because the injury occurred in an area which was not in its natural state, but rather was changed in character, the plaintiff was allowed to maintain a cause of action against the landowner. Id. at 378.

According to MCL 324.73301 and its interpreting case law, Plaintiff may not bring a cause of action if her injury occurred:

1) on the land of another without payment by the Plaintiff to the owner;
2) while motorcycling or engaging in any other outdoor recreational use or trail use; and
3) on land which is in its relatively natural state.

See, Wilson v Thomas L. McNamara, Inc, 173 Mich App 372; 433 NW2d 851 (1988).

In this case, there is no question that Plaintiff did not pay Mr. Wilkes for the use of his land. There is also no question that the riding of the ATV constitutes motorcycling or other recreational or trail use. Therefore, Defendant has satisfied the first two elements for application of the RUA.

The real question in this case is whether Plaintiff's injury occurred on a large tract of land which was in its relatively natural state. In Ellsworth v Highland Lakes Development, 198 Mich App 55; 498 NW2d 5 (1993), the Court stated that:

> The mere presence of homes near a large, undeveloped tract of land does not make the land "suburban." A suburb is "an outlying part of a city or town; a smaller place adjacent to or sometimes within commuting distance of a city; the residential area on the outskirts of any city or large town." Webster's Third New International Dictionary, Unabridged Edition (1965). Defendant's land is neither a "residential area" nor "an outlying part of a city or town."

Id. at 60 (footnotes omitted).

The Ellsworth Court also stated that the land was not considered developed just because motorcyclists and others had worn a path on the land. Id. The RUA "is not rendered inapplicable because some human activity occurs on the land." Id.

Under the holding in Ellsworth, supra, the RUA may be applicable even though Mr. Wilkes had a home on the property. Furthermore, just because Plaintiff may have been injured while exiting a worn path, the land is not necessarily considered developed. Under current case law, the central issue is whether the injury occurred on land in its relatively natural state. It is clear from Plaintiff's testimony that the injury where the woods met the grassy area, on land which was in its relatively natural state. (Deposition of Julie Neal, Appendix p. 45a) As a matter of law, Defendant is entitled to summary disposition.

Plaintiff maintains that the RUA is inapplicable because the Defendant mowed the area where the injured occurred once every three weeks. (Affidavit of Terry Wilkes, Appendix pp. 76a-77a). Although the specific area may have been mowed, the mowing did not alter the character of the land. (Affidavit of Terry Wilkes, Appendix p. 77a). The photographs (Appendix pp. 6a-8a) and testimony (Affidavit of Terry Wilkes, Appendix p.76a-77a) clearly support that Plaintiff's injury took place on land in its relatively natural state. The defendant did not fertilize, grade, clear, landscape, change, or alter the area where the injured occurred. As a matter of law, the RUA acted to bar Plaintiff's claims because Plaintiff's injuries occurred on land in its relatively natural state.

In reversing the trial court, the Court of Appeals, cited to the Supreme Court decision in Wymer v Holmes, 429 Mich 66; 412 NW2d 213 (1987) and stated:

the statute has been construed to apply "to apply to large tracts of undeveloped

> land suitable for outdoor recreational uses," not to "[u]rban, suburban, and subdivided lands . . . .

(Appendix p. 105a). The Court of Appeals also relied on one of two affidavits by Arthur St. Clair, in which Mr. St. Clair stated that Defendant's land was zoned for residential use, is both subdivided and improved, and is properly classified as urban or suburban.

However, although zoned for "residential" use, the property has none of the commonly perceived attributes of a residential neighborhood. The house is located on an 11.04 acre parcel of land. (Certified Boundary Survey, Appendix p. 10a). The Defendant's land is in "an area of large parcels of land which are generally under developed or of very low density." (Affidavit of Arthur A. St. Clair, Appendix p. 78a). Mr. St. Clair also stated that he would not consider Mr. Wilkes' property to be significantly developed. (Affidavit of Arthur A. St. Clair, Appendix p.78a). Clearly the Court of Appeals erred in merely relying the fact that the property happened to be zoned for residential use. As a matter of law, Defendant is entitled to summary disposition.

Plaintiff also argues that the RUA does not apply in this case because Ms. Neal was not on the land for the specific purpose of recreational activity, but rather she went to the Defendant's house for a social visit. She just happened to go riding during the visit. This position is untenable. The bottom line is that the only reason this injury occurred was because Ms. Neal was engaged in the recreational use of Defendant's land at the time of her injury.

The plain language of the RUA supports Defendant's position. It is significant that the Legislature used the present tense in referring to the injured person: ". . . for injuries to a person who is on the land of another. . . .", and the legislators did not provide that the injured person's sole reason for coming upon the lands must have been to engage in outdoor recreational activity.

The language of the RUA makes clear that the RUA is to apply whenever the injured person is engaged in outdoor recreational use of the land at the time of injury. Stated conversely, if the Legislature had intended the RUA provisions to apply only when the injured person's **sole** reason for coming upon the land and staying on the land is outdoor recreational use, then the Legislature would have so provided by using a past tense and somewhat different language (i.e., . . . injury to any person who has come upon the land of another. . . .).

It is understandable that the lawmakers chose not to limit the RUA's application. People, like Ms. Neal, have multiple motivations for going upon another's land. Moreover, the motivations may change throughout the day. The Legislature wanted to address liability for injuries occurring during the outdoor recreational use of the land. The present tense used eliminates complex disputes as to the specific motivations and activities of the injured person at irrelevant times, that is, times other than when the injury occurs. By use of the present tense the lawmakers made it clear that the RUA is to apply always and only when the injury occurs during gratuitous outdoor recreational use of land. There is no question that Ms. Neal was engaged in the gratuitous outdoor recreational use of the land by riding the ATV and that was her sole purpose at the time of the accident.

In this matter, it is clear that Plaintiff's injury occurred on land which was in its relatively natural state. As such, the Court of Appeals failed to properly apply the RUA to this case. Even under the Wymer holding, Defendant was entitled to summary disposition. This Court should reverse the Court of Appeals' decision and reinstate the lower court's order granting summary disposition.

II. The Recreational Land Use Act Should Apply to Residential Lands

A. Standard of Review

The Court also asked the parties to brief the issue of whether the RUA applies to "residential" lands. Questions of statutory interpretation are reviewed de novo. In re MCI Telecommunications, 460 Mich 396, 413; 596 NW2d 164 (1999).

B. The Plain Language of the Recreation Land Use Act Applies to Residential Property.

A plain reading of the RUA and case law which pre-dates Wymer, indicates that the RUA applies to residential property. In Pohutski v City of Allen Park, 465 Mich 675, 693-94;641 NW2d 219 (2002), this Court stated:

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. *DiBenedetto v. West Shore Hosp.*, 461 Mich. 394, 402, 605 N.W.2d 300 (2000); *Massey v. Mandell,* 462 Mich. 375, 379-380, 614 N.W.2d 70(2000). We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. *Turner v. Auto Club Ins. Ass'n,* 448 Mich. 22, 27, 528 N.W.2d 681 (1995). Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed--no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto, supra* at 402, 605 N.W.2d 300. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. *See Lansing v. Lansing Twp.*, 356 Mich. 641, 649-650, 97 N.W.2d 804 (1959).

Pohutski, 465 Mich at 683.

This is exactly the approach which was taken by the Court of Appeals in Winiecki v Wolf, 147 Mich App 742; 383 NW2d 119 (1986). In Winiecki, the Court was asked whether the RUA applied when the injury occurred during a family reunion game which took place in the defendant's backyard. In applying the plain meaning rule, the Court stated:

> This statute, as the trial court has already observed, is clear and unambiguous. Plaintiff was a person on the lands of another, without paying a consideration, for the purpose of an outdoor recreational use. The statute offers nothing on its face excluding from its application the backyard of residential property. If the Legislature did not intend the statute to apply to parcels of land this size, it was within its power to insert words limiting the statute's application, *e.g.*, to lands in their natural state. As we, however, are constrained to apply the statute as written, we cannot say that the trial court erred in relieving defendants of liability based on the recreational use statute.

Id. at 745.

As the Winiecki Court held, the plain language of the RUA is clear and unambiguous on its face. As such, there was no reason for the Wymer Court to interpret what the Legislature meant in enacting the statute. Had the Legislature intended to limit the applicability of the act to large tracts of urban land, it would have done so with plain language.

The issue of whether the RUA should apply in an urban setting was addressed by the Court of Appeals in Syrowik v City of Detroit, 119 Mich App 343; 326 NW2d 507 (1982). In that case, the plaintiff was injured while tobogganing on Derby Hill which was owned by the City of Detroit. The trial court had ruled that the RUA precluded plaintiff from bringing any claims for negligence against the City of Detroit. The plaintiff appealed this decision arguing that the RUA did not apply to property located in urban areas.

In affirming the trial court's decision, the Court stated:

> Plaintiffs' argument is without merit. The statute makes no reference to a distinction between urban and rural areas. The imposition of such a distinction by this Court would require the drawing of an arbitrary dividing line between what is urban and what is rural. Furthermore, to give the statute the construction urged by plaintiffs would do violence not only to the wording of the statute but to the intent of the Legislature. This Court has previously held that this statute should be given a liberal construction to carry out the Legislature's intent to further recreational activities in Michigan by making certain areas available for such purposes while codifying tort law principles limiting the liability of land owners to those who

> come gratuitously upon their lands. *Thomas v. Consumers Power Co.,* 58 Mich.App. 486, 228 N.W.2d 786 (1975).
>
> Also, this Court has previously applied M.C.L. § 300.201; M.S.A. § 13.1485 to bar actions by plaintiffs injured in public parks in urban settings. See *Anderson v. Brown Bros., Inc.,* 65 Mich.App. 409, 237 N.W.2d 528 (1975), *Thomas v. Consumers Power Co., supra.*

Syrowik, 119 Mich App at 346-347. Clearly, before Wymer the RUA applied to urban and suburban property. As such, it would have applied to residential property as well.

The Wymer decision represented a radical departure from the plain meaning of the statute. Under Wymer, the RUA would only apply to "large tracts of undeveloped land suitable for outdoor recreational uses." Wymer, 429 Mich at 79. Interestingly, the Wymer court never addressed the rationale set forth in Syrowik, supra. It is clear from the plain language that the RUA should not be restricted to "large tracts of undeveloped land" and should apply to residential lands.

III. This Court Should Reverse the Wymer and Ballard Decisions.

Although stare decisis is generally the preferred course, it "should not be applied mechanically to prevent this Court from overruling erroneous decisions regarding the meaning of a statute." Pohutski v City of Allen Park, 465 Mich 675, 693-94;641 NW2d 219 (2002). The Wymer decision should be reversed as its deviation from the plain language of the statute creates a host of new problems.

From the time when the RUA was first introduced to the as House Bill 241 in 1953, the Legislature has continued to increase the scope of the activities covered under the RUA. Initially, the RUA only sought to protect land owners from injuries while hunting. (1953 Journal of the Senate, 374). Before the bill was ever enacted into law, the Legislature amended the bill to

include fishing and trapping.(1953 Journal of the Senate, 483, 609).Gradually, the scope of the activities covered in the RUA has grown to also include "camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use." MCL 324.73301(1).

Despite the Legislature's expansion of the types of activities covered under the RUA, the Courts have sought to restrict the type of land to which the RUA applies. The pattern of systematically restricting the land to which the RUA applies was completed by the Court in Wymer. In making its decision, the Wymer Court improperly ignored the plain language of the RUA, speculated as to the intent of the RUA, and created ambiguity where none existed. This Court now has the chance to overturn Wymer, supra.

The plain language of the RUA merely states that the injury must occur while on "land". There are no qualifiers as to the type of land or restrictions as to the size of land. The plain language of the RUA provides immunity to a landowner[1] whose land may be used for recreational purposes as long as the injury is not a result of the landowner's gross negligence. Despite this fact, the Wymer Court limited the application of the RUA to "large tracts of undeveloped land suitable for outdoor recreational uses." Id at 79. The Wymer Court relied heavily on the case of Thomas v Consumers Powers Co, 58 Mich App 486; 228 NW2d 786 (1975), rev'd in part and aff'd in part 394 Mich 459; 231 NW2d 653 (1975), and actually expanded the Thomas holding. In Thomas, the Court applied the RUA to injuries which occurred on the Saginaw County fairgrounds, located in the City of Saginaw. Id. at 489. The Court stated:

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[1]The plain language of the RUA applies equally to landowners, tenants, and lessees. However, for simplicity, the term landowner will be used throughout the brief.

> We perceive a legitimate state objective in promoting tourism and in opening up and making available vast areas of vacant but private lands to the use of the general public.

Id. at 495-96.

Both the Thomas and Wymer Courts ignored the plain meaning of the statute by placing qualifiers on the type of land which is covered by the RUA. The Wymer Court's misapplication of the plain meaning rule affects any owner of large plots of land which is suitable for recreational activities which may be in a suburban or urban area. There is nothing in the plain language of the RUA which excludes property like the property owned by the Defendant.

Furthermore, the Thomas and Wymer limitations create more questions which now must be answered by the trial court or a trier of fact. For example, under the plain language of the statute, a court or trier of fact need not look at the type of land to determine whether it is "large" or "undeveloped." The trier of fact need only look at how the land is being used. However, under Wymer, the Court or trier of fact must first determine whether the land is large enough or undeveloped enough to be included under the RUA. This unnecessary step leads to a further complication which occurs when a portion of the land in developed (i.e., has a house) but large portions of the land remain undeveloped. This very issued was alluded to by the Court of Appeals in this case when it stated:

> Furthermore, while it could be argued that the wooded portions of defendant's twelve acre plot are covered by the RUA because of their undeveloped nature and the impracticality of keeping these areas safe for public use, see Wymer, supra, at 79, it is undisputed that plaintiff's injuries were not incurred on this portion of defendant's property.

(Appendix p. 104a).

Such complications do not arise under a plain meaning interpretation of the RUA. Had

the Legislature intended the RUA to only apply to large tract of undeveloped land, the Legislature could have easily placed such language in the RUA. The rationale of the Syrowik, supra, should be applied, and this Court should overturn Wymer and the portion of Ballard v Ypsilanti Twp, 457 Mich 564; 577 NW2d 890 (1998), which stand for the proposition that the RUA only applies to large tracts of undeveloped land.

This very issued was addressed by the California Supreme Court in the case of Ornelas v Randolph, 4 Cal 4th 1095; 847 P.2d 560 (1993). While Ornelas is not binding on this Court, the logic of the Court certainly provides support for the reversal of Wymer. In the Ornelas, the plaintiff and five other children were playing on the portion of defendant's property where farm equipment was stored. Id. at 1098. The plaintiff was injured when one of the children dislodged a metal pipe from the farm equipment which fell on the plaintiff. Id. The plaintiff filed a negligence action against the land owner.

The defendant claimed that plaintiff's claims were barred as a matter of law under the California Recreational Use Act, which states in pertinent part:

> An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.
>
> A 'recreational purpose,' as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

Cal Civil Code § 846.

The California Supreme Court stated:

> Thus, the Legislature has established two elements as a precondition to immunity: (1) the defendant must be the owner of an "estate or any other interest in real property, whether possessory or nonpossessory;" and (2) the plaintiff's injury must result from the "entry or use [of the 'premises'] for any recreational purpose."

Ornelas, 4 Cal 4th at 1100. The Court determined that both of these elements had been satisfied in that case.[2]

The California Court went on to state that the California courts had added a third, nontextual element for Section 846 immunity to apply:

> [The Courts] have held, in addition to the requisite interest in land and recreational purpose, that the property in question must also be "suitable" for a recreational pursuit in order to qualify for statutory immunity.
>
> In other words, if a recreationist enters the land to engage in one of the enumerated activities, and it develops that, in the court's judgment, the land is inappropriate for that use, the statute will not apply and the landowner will be liable if the recreationist is injured. . . .
>
> The reasoning behind the judicially created "suitability" exception is relatively simple. Because the Court have held, the purpose of section 846is to encourage owners to allow the general public to use their land for recreational purposes, the legislative goal is not served unless the property is the kind of which recreational pursuits are appropriate or "suitable."

Id. at 1103.

In completely rejecting this argument, the California Court stated:

> The first point to be noted about the "suitability" requirement is its origin; it is a purely judicial construct, without any basis or support in the statutory language. Indeed, as earlier discussed, the text of section 846 is extremely broad; the

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[2]Defendant is not advocating that the California Supreme Court's finding that the type of activity described in Orlenas is necessarily "recreational use" as defined by the California Code or the MCL 324.73301.

immunity applies to the "owner of *any* estate or *any* other interest in real property, whether possessory or nonpossessory...." (Italics added.) The Legislature made no distinction between developed and undeveloped property or between urban and rural land, and imposed no requirement that the site be in a "natural" or unaltered state. As we have previously observed, "section 846 is by no means limited to land in its natural condition--it specifically mentions 'structures'--it obviously encompasses improved streets." (*Delta Farms Reclamation Dist. v. Superior Court, supra,* 33 Cal.3d at pp. 706-707, 190 Cal.Rptr. 494, 660 P.2d 1168; see also *Valladares v. Stone, supra,* 218 Cal.App.3d at p. 370, 267 Cal.Rptr. 57 ["The Legislature did not limit section 846 to rural as opposed to urban land."].)

Thus, assuming the requisite "interest" in land, the plain language of the statute admits of *no* exceptions, either for property "unsuitable" for recreational use or otherwise.

Ornelas, 4 Cal 4th at 1105.

The Court continued:

A graded housing tract is certainly not designed for recreational purposes, but when it is *used* as such, within the meaning of section 846, it is reasonable to put the user at risk. The public policy balance achieved by the statute is clear: landowners are broadly encouraged to allow access to their property; recreationists who take advantage of this access waive their right to sue for ordinary negligence. The determination as to whether the land is "suitable" for recreation is placed on the user, not the courts. As the court observed in *Stout v. U.S.* (D.Hawaii 1987) 696 F.Supp. 538, 539 (holding a nearly identical Hawaii statute to be applicable to "a debris and litter ridden piece of woods on a military base"): "The statute does not create a qualitative factor as to what land can be deemed recreational and what cannot. The statute encompasses any land that is *used* for recreation, rather than what some court may determine is recreational land." (*Ibid.,* original italics.)

Our conclusion that the Legislature did not intend to confine section 846 immunity to land "suitable" for recreational use is also supported by practical considerations. As the instant case illustrates, the concept of "suitability" is elusive and unpredictable. As a purely judicial construct it has engendered disparate application.

Ornelas, 4 Cal 4th at 1106.

The California Supreme Court abandoned the "suitability" test stating:

> assuming, as we must, that the Legislature chose its words carefully, the broad language of the statute suggests that the Legislature consciously eschewed any restrictions on the property subject to the statute in order to provide clear guidance to landowners, to encourage access to recreationists, and to fairly balance the interests of both.

Id. at 1108.

Like the California RUA, the plain language of the Michigan RUA merely requires that the person seeking immunity have an interest in the land and that the injury occur during recreational use of the land. Like in California, the Michigan Courts have adopted a third, nontextual requirement that the injury occur on large tracts of undeveloped land. As the California Supreme Court did in Ornelas, this Court should abolish the third, nontextual requirement as it is not encompassed in the plain meaning of the statute. The test which should be adopted by the Michigan Courts is not whether the injury occurred on land defined by the Court as being suitable for recreational use (i.e., large tracts of undeveloped land), but rather whether the injury occurred as the result of a recreational use. This way the Courts are not arbitrarily excluding land which is suitable for recreational use but is excluded under RUA merely because it happens to be in an urban or suburban area.

Plaintiff has argued that the Legislature effectively ratified Wymer when the RUA was amended in 1993 by 1993 PA No 26. The new legislation added several subsections to MCL 324.73301, so that its pertinent parts now read:

> (1) Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

> (2) A cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of entering or exiting from or using a Michigan trailway as designated under part 721 or other public trail, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. For purposes of this subsection, a Michigan trailway or public trail may be located on land of any size including, but not limited to, urban, suburban, subdivided, and rural land.

Id.

First and foremost, only subsection 1 of the RUA applies in this case as the injury occurred on Defendant's land during Plaintiff's recreational use. Subsection 2 does not apply as Plaintiff was not entering, exiting, or using on a Michigan trailway or public trailway. Again, subsection 1 merely requires that the injury occur on land. There is no qualification of the land as espoused by the Wymer court.

In support of her position, Plaintiff argues that the Legislature intended the holding in Wymer to be embodied in the amended act for two reasons. First, Plaintiff points out that the Wymer decision was rendered prior to the 1993 amendment to the RUA. Plaintiff argues that the because the Legislature is charged with knowledge of the appellate courts decisions, the Legislature "acquiesced" to the Court's previous ruling.

However, "legislative acquiescence" is "poor indicator of legislative intent." Donajkowski v Alpena Power Co, 460 Mich 243, 258; 596 NW2d 574 (1999). In citing to Justice Taylor's dissent in Rogers v Detroit, 457 Mich 125,163-66; 579 NW2d 840 (1998), Justice Young explained why "legislative acquiescence" is not reliable:

> [The majority's legislative acquiescence argument] is remarkable indeed and is perhaps what former Harvard University Law School Professor Thomas Reed Powell meant when he said in discussing legislative acquiescence arguments of

this type:

> " '[C]ongress has a wonderful power that only judges and lawyers know about. Congress has a power to keep silent.... Of course when congress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that congress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking.' " [*Report to the Attorney General, Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation,* U.S. Dep't of Justice, Office of Legal Policy, January 5, 1989, p. 110, n. 475, citing Powell, *The Still Small Voice of the Commerce Clause,* in 3 Selected Essays on Constitutional Law 931, 932 (Ass'n of American Law Schools 1938), quoted in Tribe, *Toward a syntax of the unsaid: Construing the sounds of congressional and constitutional silence,* 57 Ind. L.J. 515, 522 (1982).]
> I believe that the majority's legislative factual history argument ... is, as Justice Scalia so aptly said of similar legislative history arguments, "frail substitute[ ] for bicameral vote upon the text of a law and its presentment to the [executive]." *Thompson v. Thompson,* 484 U.S. 174, 192, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988). In fact, if such "history" tells us anything, its meaning eludes me. At the very most, it is a "history" that allows the reader, with equal plausibility, to pose a conclusion of his own that differs from that of the majority.

> The majority's analysis poses yet a further problem, for it should not be assumed that the Legislature even agrees it has a duty to correct interpretations by the courts that it considers erroneous. As Judge Stephen Markman, of our Court of Appeals, insightfully observed on this topic in one of his scholarly writings, "no sensible theory of statutory interpretation would require Congress to devote a substantial portion of its time to extinguishing judicial forest fires." Markman, *On interpretation and non-interpretation,* 3 Benchmark 219, 226, n. 60 (1987).

Donajkowski, 460 Mich at 258-260, citing Rogers v Detroit, 457 Mich 125,163-66; 579 NW2d 840 (1998), dissenting opinion. (Footnotes omitted). The Donajkowski Court concluded by stating:

> If it has not been clear in our previous decisions, we wish to make it clear now: "legislative acquiescence" is a highly disfavored doctrine of statutory

> construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words,* not from its silence.

Donajkowski, 460 Mich at 261. It is clear that Plaintiff's "legislative acquiescence" argument is flawed.

Second, Plaintiff argues that the addition of subsection 2 provides evidence that the Legislature intended to incorporate the Court's interpretation in Wymer into subsection 1. Subsection 2 states:

> For purposes of this subsection, a Michigan trailway or public trail may be located on land of any size including, but not limited to, urban, suburban, and rural land.

MCL 324.73301(2).

Subsection 2 has no impact on the plain reading of subsection 1 as subsection 2 is not concerned with the recreational use on the property where the injury occurs. Rather, subsection 2 only applies in three very specific instances: 1) when a person is on the property of another for the purpose of entering a Michigan trailway or other public trailway; 2) when a person is on the property of another for the purpose of exiting a Michigan trailway or other public trailway; and 3) when a person is using a Michigan trailway or other public trailway. MCL 324.73301(2). There is no requirement in subsection 2 that the injured party be engaged in any recreational activity at the time of the injury. Basically, subsection (1) is concerned with how the land is being used (i.e., is there a recreational use), while subsection (2) is more concerned with the situs of the injury (i.e., did the injury occur while on a public trial or land adjacent to the public trail). A definition of land is required for subsection (2) because the situs is so important.

The additional language defining the type of land covered by subsection 2 is necessary as Michigan trailway or other trailway act as qualifiers. A "Michigan trailway" is defined as "a trailway designated by the commission pursuant to section 72103." MCL 324.72101(e). MCL 324.72103 provides a laundry list of requirements which must be met before a trailway may be considered a Michigan trailway. A "trailway" is defined as "a land corridor that features a broad trail capable of accommodating a variety of public recreation uses. MCL 324.72101(g).

Unlike like subsection 1, which applies to all land, the general public may have a preconceived notion as to what a Michigan trailway or other public trailway is. An ordinary person would normally consider a trailway to be found only in a rural setting. As such, when the Legislature limited the type of land to which subsection 2 would apply, the Legislature needed to specifically define the type of land covered in subsection 2 . The definition contained in subsection 2 has no relevance to the unqualified use of the word "land" in subsection 1.

IV. Reversal of the Wymer and Ballard Decisions Would Have Limited Affect on the General Body of Principles Governing Outdoor Premises Liability.

The overruling of Wymer and Ballard would have absolutely no impact on how the RUA is applied and the rights or duties of those persons already covered under the RUA. The real impact of overturning the Wymer and Ballard decisions would be in who is entitled to protection under the RUA. By removing the land restrictions set forth in Wymer, there is no question that more landowners would be protected, which would affect the rights of those persons injured while engaging in recreational use of the land. However, at the same time, those landowners would be encouraged to open their property for the recreational use of others. From a practical

standpoint however, the general body of principles governing outdoor premises liability law would not be significantly impacted.

In Stitt v Holland Abundant Life Fellowship, 462 Mich 591; 614 NW2d 88 (2000), this Court provided a synopsis of the three common-law categories for persons who enter upon the land of another: (1) trespasser, (2) licensee, and (3) invitee. Id. at 596. The Court stated:

> Each of these categories corresponds to a different standard of care that is owed to those injured on the owner's premises. Thus, a landowner's duty to a visitor depends on that visitor's status.

Id. (citations omitted).

The first of the three common-law categories for persons on the land of another is the trespasser. In Stitt, supra, this Court stated:

> A "trespasser" is a person who enters upon another's land, without the landowner's consent. The landowner owes no duty to the trespasser except to refrain from injuring him by "wilful and wanton" misconduct.

Id.

Any ruling by this Court abandoning the Wymer land restrictions, would have no impact on the duties owed by a landowner to a trespasser. Under the RUA the landowner is only insulated from acts of ordinary negligence. The RUA specifically provides that an injured party retains a cause of action for any gross negligence or willful and wanton misconducted on the part of the land owner. The duties owed to persons under the RUA are similar to the duties owed to a trespasser, and therefore a reversal of Wymer would have no impact on a trespasser's rights.

The second of the three common-law categories for person on the land of another is the

licensee. In Stitt, supra, this Court stated:

> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. *Id.* **A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved.** The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. *Id.* Typically, social guests are licensees who assume the ordinary risks associated with their visit. *Preston, supra* at 451, 175 N.W.2d 759.

Stitt, 462 Mich at 596. (Emphasis added). See also, Burnett v Bruner, 247 Mich App 365; 636 NW2d 773 (2001), lv den 466 Mich 875 (2002).

Ms. Neal would be considered a "licensee" as she was the social guest of Mr. Wilkes. Applying the RUA to cases involving outdoor recreational injury to social guests would not constitute a dramatic departure from the common law. The common law has always limited a landowner's duties toward licensees. In Michigan, with respect to social guests and alleged defective conditions:

> . . . a social guest injured by a defect in the premises may not recover against his host in the absence of evidence establishing something more than ordinary negligence in the maintenance of the premises. More specifically, it has been held that a guest can recover only where his injury is the result of active and affirmative negligence of the host while the guest was known to be on the premises, or of the failure of the host to remove or warn against defects amounting to a trap or pitfall known by the host to present a danger to his guest, and which he also knows the guest will not, in exercise of reasonable care, discover and avoid himself.

25 ALR 2d 598, at p 600; Preston v Sleziak, 383 Mich 442; 452; 175 NW2d 759 (1970).

The only difference between the duties owed to a trespasser and the duties owed to a licensee is the duty to warn of hidden dangers the owner knows or has reason to know of, if the

licensee does not know or have reason to know of the dangers involved. Arguably, this limited common law duty to warn owed to licensees would be abrogated by the RUA. See, Wymer, 412 Mich at 71, n 1. As such, in all cases involving a recreational activity where the RUA would apply, the injured party would be treated as a trespasser, and only claims of gross negligence or willful and wanton misconduct would survive.

From a public policy standpoint this makes sense. As was explained by the Ornelas Court, the landowners are encouraged to open their land up for recreational use because they are afforded immunity. The recreationists are may take advantage of the access to the land, but must waive their right to sue for an ordinary negligence claim. Each person benefits from application of the RUA.

The last of the three common-law categories for person on the land of another is the invitee. In Stitt, supra, this Court stated:

> An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Wymer, supra* at 71, n. 1, 412 N.W.2d 213. The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. *Id.* Thus, an invitee is entitled to the highest level of protection under premises liability law. *Quinlivan v. Great Atlantic & Pacific Tea Co., Inc.,* 395 Mich. 244, 256, 235 N.W.2d 732 (1975).
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees

against the danger. *Id.* at 258, 235 N.W.2d 732, citing Restatement, § 343.

> The Court of Appeals correctly recognized that invitee status is commonly afforded to persons entering upon the property of another for business purposes. See, e.g., *Nezworski, supra; Pelton v. Schmidt,* 104 Mich. 345, 62 N.W. 552 (1895).

Stitt, 462 Mich at 597.

As with the licensee, under the RUA the duties owed by the landowner to an invitee, would be akin to the duties owed to a trespasser. The landowner's duty to inspect the premises for dangers, warn the invitee of known dangers, and/or make necessary repairs would be abolished. Again, the invitee would retain the right the claim of gross negligence and willful and wanton misconduct against the landowner. While application of the RUA would have the greatest impact on the duties owed to an invitee, from a practical standpoint, there would be very few, if any, situations where an invitee would be involved in the recreational use of a landowner's property. As such, the RUA would rarely, if ever, apply to an invitee.

Even in the unusual cases where the RUA may apply to an invitee, there is precedent for the curtailing of the duties owed to an invitee. For example, the duties owed to an invitee have been diminished in cases where the invitee encounters an open and obvious danger. See, Lugo v Ameritech Corp, 464 Mich 512; 629 NW2d 384 (2001); Joyce v Rubin, 249 Mich App 231; 642 NW2d 360 (2002); and Corey v Davenport College of Business, 251 Mich App1, 649 NW2d 392 (2002).

It has been suggested that if the Wymer restrictions of "large tracts of undeveloped land" were removed, the scope of the premises liability would radically change as all landowners,

regardless of the size of the land, would be insulated from liability for injuries occurring on land. This is not the case.

First, the RUA would not insulate the landowner from acts of gross negligence or willful and wanton misconduct. Second, the RUA would only insulate the landowner from causes of actions for injuries the injury occurred during the outdoor "recreational" use on the land. For example, the RUA would not apply to injuries which occurred while walking up the driveway to attend a dinner party as the injured party would not have been engaged in recreational use of the land. Finally, the injury must result while using the land. This requirement would keep intact the current law which requires the land to be in its relatively natural state. Wilson v Thomas L. McNamara, Inc,. 173 Mich App 372; 433 NW2d 851 (1988). As such, persons injured while using artificial objects such as swimming pools, man-made ponds, or docks would be still be allowed to pursue negligence actions against the landowner's ordinary negligence associated with these artificial objects. In essence, the overturning of Wymer and Ballard would have limited impact on the general body of premises liability law as it would only apply in specific instances where a person was injured while engaged in the recreational use of another's land.

Relief Requested

Defendant-Appellant respectfully requests that this Court reverse the Court of Appeals' decision and reinstated the judgement of the trial court. Furthermore, Defendant-Appellant requests that this Court overturn its decisions in Wymer and Ballard.

Dated: 12-11-03

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